IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 27, 2009

STATE OF TENNESSEE v. CHARLES EARNEST WARD

Appeal from the Circuit Court for Blount County
No. C-17510 David R. Duggan, Judge

No. E2008-02800-CCA-R3-CD - Filed December 1, 2009

The defendant, Charles Earnest Ward, pleaded guilty to one count of promotion of methamphetamine manufacturing. *See* T.C.A. § 39-17-433 (2006). A plea agreement with the State provided for a three-year sentence with the manner of service to be decided by the trial court after a sentencing hearing. The trial court ordered the defendant to serve his entire three-year sentence incarcerated, and the defendant appeals and argues that the trial court erred in denying alternative sentencing. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal); and Mack Garner, District Public Defender (at trial), for the appellant, Charles Earnest Ward.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Kathy Aslinger, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 6, 2008, the District Attorney General filed an information, with the agreement of the defendant, charging him with acquiring pseudoephedrine for the purpose of producing methamphetamine, a Class D felony. On the same day, the defendant entered into a plea agreement with the State for a three-year sentence as a Range I, standard offender and a $2,000 fine. The agreement provided that the trial court would determine the manner of service of the defendant's sentence.

At the sentencing hearing, the defendant asked for a sentence of split confinement. The defendant, an Anderson County resident, testified that he was 39 years old, that he had been

divorced twice, and that he had four children in three states. The defendant explained that he suffered from a "[p]ersonality disorder" that required medication. The defendant stated that he pleaded guilty because he "was buying Sudafed . . . [f]or $50 a box." He stated that he knew an unidentified person to whom he could sell the pills for the manufacture of methamphetamine. He would not disclose the name of the individual because he did not want the individual to harm his family. He said that this person was very dangerous.

The defendant stated that he supported himself though payments from the Social Security Administration and the Veterans Administration. He stated that, after child support was garnished from his check, he lived on $550 a month. He explained that, after paying his rent and utilities, he would "be broke," so he sold boxes of pseudoephedrine to make extra money. He estimated that he had sold pseudoephedrine for a profit on about five occasions. He had similar charges pending against him for selling pseudoephedrine in Anderson County.

The defendant admitted to using methamphetamine, but he stated that he had not used the drug in five or six months. He said he had quit using methamphetamine, and he said, "I'm done with it." The defendant admitted to a marijuana related conviction; however, he maintained that he had not been convicted of any felonies. He explained that he was placed on probation for his marijuana conviction and that the probation was scheduled to end the following month. The defendant also admitted to a conviction of theft of property valued at $500 or less, but he maintained that he "was with somebody else that stole something from Walmart and [he] got charged with it, too." He testified that he received unsupervised probation in that case. The defendant also stated that he completed probation for an assault conviction in Michigan "[a]bout six years ago."

The defendant testified that he would continue to support himself from his Social Security and Veterans Administration payments. He stated that he did not own a vehicle and that he would "have to try to get somebody to bring [him]" to report to his probation officer. He stated that he did not have any local family who could drive him. The defendant testified that he was unsure whether his apartment was still available because he had been incarcerated at the Blount County jail for approximately four months.

The defendant testified that he sold pseudoephedrine to raise money to pay another person's bond, and he admitted that he committed the crime while on probation for another crime. He further admitted that he knew that he was violating the rules of his probation. When asked why the trial court should give him another opportunity at probation, the defendant responded, "Well, I've been pretty good at staying out of jail most of my life. I'm 39, be 40 years old in January, and . . . this is the longest I've ever been in jail." The defendant explained that, before the current case, he had not been in jail for more than 10 days. The defendant said that he would not commit illegal acts on probation and that he could pass a drug screen. He told the court that he regretted his actions.

On cross-examination, the defendant explained that he bought the pseudoephedrine to raise money for his friend Patrick Johnson's bond. He also explained that Mr. Johnson was in jail for the same charges. He also admitted that, when he was arrested for the current offense, he was

with Derek Glandon and Lorraine Miller, who also were buying pseudoephedrine for the production of methamphetamine. The defendant acknowledged that he had "quite a few friends" involved in purchasing ingredients for methamphetamine, but he stated, "I'm not going to hang around people like that anymore."

The defendant also admitted on cross-examination that he incurred an additional charge in Anderson County for vandalism for cutting somebody's tires. He conceded that his current offense involved his going to five different pharmacies and that the police found him with 242 pseudoephedrine pills. He stated that he had not held a job in a long time because of his mental disability.

The trial court determined that two enhancement factors applied to the defendant. First, the court determined that the defendant had previous convictions in addition to those necessary to establish the appropriate range. *See* T.C.A.§ 40-35-114(1) (2006). Secondly, the court found that the defendant failed to comply with the conditions of a sentence involving release into the community. *See id.* § 40-35-114(8). The court noted that, even though neither Anderson nor Knox Counties had filed a violation of probation warrant at that time, the defendant clearly admitted to violating the terms of his probation in committing the current crime. The court commented, "I don't think there's any chance at all that [the defendant is] going to do anything other than continue to commit crimes on probation after a split confinement." The court noted that the defendant had a "very callous regard for the law." The court also deemed society's interests best served by full incarceration because the court considered the defendant "virtually certain" to commit future crimes.

The trial court sentenced the defendant to serve a fully incarcerative, three-year sentence. The defendant filed a timely notice of appeal.

On appeal, the defendant argues that the trial court erred in ordering him to serve his entire sentence incarcerated. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The defendant is considered a favorable candidate for alternative sentencing for his Class D felony conviction. T.C.A. § 40-35-102(6) (2006). As the recipient of a sentence of ten years or less, the defendant is also eligible for probation. *See* T.C.A. § 40-35-303(a). The defendant bore the burden of showing that he was entitled to probation. *See, e.g.*, *State v. Mounger*, 7 S.W.3d 70,

78 (Tenn. Crim. App. 1999) (holding that defendant bears the burden of establishing his "suitability for full probation"). In determining sentences involving confinement, the trial could should consider whether "[c]onfinement is necessary to protect society by restraining a defendant with a long history of criminal conduct," whether "[c]onfinement is necessary to avoid depreciating the seriousness of the offense," whether incarceration provides "an effective deterrence to others likely to commit similar offenses," and whether "[m]easures less restrictive than confinement have been unsuccessfully applied to the defendant." T.C.A. § 40-35-103(1)(A)-(C).

To determine the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
> (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b). Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative." *Id.* § 40-35-103(5).

The record before us shows adequate grounds upon which the trial court based a sentence of full confinement. We note that the defendant admitted violating his probationary terms by committing the instant offense. Such a disrespect for community based sentencing can serve alone as a ground for denying alternative sentencing. Further, we note that the defendant's criminal record showed a long history of criminal conduct. Although we observe that he has no prior felony convictions, his criminal history evinces continued criminal conduct, often involving drugs. The record supports a holding that the defendant was not amenable to correction. The defendant failed to show his suitability for probation, and the State succeeded in showing that the defendant should not be granted any other form of alternative sentencing. We will not disturb the trial court's denial of alternative sentencing.

Based on the above analysis, we affirm the judgment of the trial court.

_____
JAMES CURWOOD WITT, JR., JUDGE